SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. _____

GENIE LAND COMPANY, a Montana corporation; CHARLES KELLY KLUVER, and KARSON KLUVER,

Petitioners,

vs.

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY, THE HONORABLE GARY L. DAY,

Respondents

PETITION FOR WRIT OF SUPERVISORY CONTROL

Original Proceeding arising from the Sixteenth Judicial District Court, Rosebud County, Genie Land Co., et al. v. Great Northern Properties, LP, et al., Cause No. DV-07-26, Honorable Gary L. Day, Presiding Judge

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I. INTRODUCTION

Petitioner's Kelly and Karson Kluver are fourth generation Montana cattle ranchers. The Kluver family ranch, now known as Genie Land Company, was established in Rosebud County at the end of the 19th century. In 1945 and 1947, the Kluvers' predecessors purchased two sections of land from the Northern Pacific Railroad. These sections became an important part of the Kluver ranch. However, the railroad retained the mineral rights to this land.

The mineral reservation in the deeds required that, in the event the railroad ever sought to exercise its mineral rights, it would pay the ranchers for any surface lands used in its mining operations:

> "excepting and reserving unto the grantor [the railroad], its successors and assigns, forever, all minerals ... together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee [the ranchers] or to its successors or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations or injured thereby, including any improvements thereon ..."[1]

Through a lease, the coal mining corporation Western Energy Company (WECo) is the successor in interest to the railroad's rights and obligations under the mineral reservation.

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[1]Exh. 1, mineral reservation (emphasis added).

During the 1980s, this Court twice heard appeals in cases between the Kluvers and WECo regarding the mineral reservation. WECo sought to strip-mine coal on the two sections of Kluvers' ranch at issue here. Such mining involves removing the entire top 50 to 100 feet of the land in order to access the coal below. This Court held that it was fair to allow WECo to strip-mine because the mineral reservation assured Kluvers payment for their surface lands at the time mining commenced.

In 2002, when WECo and the Kluvers could not agree regarding the value that WECo should pay for the Kluvers' surface lands, WECo came on the Kluvers' ranch and literally strip mined it out from underneath them. In response, Kluvers filed this case sounding in trespass and other theories. WECo is still operating on the Kluvers' Ranch today and still has never paid Kluver's a penny for the surface that it has strip-mined for the past eight years.

Contrary to this Court's earlier interpretation, the district court recently held that the mineral reservation did not actually require WECo to pay Kluvers for the use of their surface lands at the time mining commenced. Rather, the district court adopted WECo's interpretation that the provision for payment of "market value at the time mining operations are commenced" simply establishes the date on which the market value of Kluvers' land is to be measured. According to WECo, the

mineral reservation does not specify when WECo is actually supposed to pay, so WECo can strip-mine private land and then pay Kluvers the 2002 value of that land years or even generations later.

The district court adopted WECo's bizarre construction of the mineral reservation by finding an ambiguity in the payment provision and then invoking a statutory presumption in favor of the grantor's interpretation.[2] Notwithstanding the fact that the railroad was the actual grantor, the district court held, as a matter of law, that WECo's interpretation of the mineral reservation governs. The district court then, *sua sponte,* granted summary judgment for WECo on Kluvers' trespass claim.

The district court's summary dismissal of the Kluvers' trespass claim has catastrophic consequences for their efforts to protect their private property rights. The district court's analysis also has serious constitutional implications in a State where split estates abound and coal strip-mining is an increasingly important issue.

The Kluvers respectfully request this Court to take supervisory control and direct that, under the Court's prior interpretation of the mineral reservation, WECo's entry on Kluvers' land without paying for the right to use that land

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[2]See § 70-1-516, MCA (Interpretation against grantor -- exception).

constitutes a trespass. In the alternative, a jury should be allowed to consider extrinsic evidence and determine the meaning of the payment provision in the mineral reservation.

II. ISSUES PRESENTED FOR REVIEW

1) Did the district court err in determining that WECo was entitled to strip-mine without paying Kluvers for their surface lands?

2) If the mineral reservation is ambiguous, did the district court err in taking the issue from the jury and adopting WECo's construction as a matter of law?

3) Is supervisory control Appropriate?

III. FACTS AND PRIOR PROCEDURE

A. Prior Court Rulings.

In, *Western Energy Company v. Genie Land Company*, 195 Mont. 202, 635 P.2d 1297 (1981) (*WECo I*), this Court addressed whether the mineral reservation gave WECo the implicit right to enter the Kluvers' property for the purpose of conducting a mineral inventory.[3] This Court decided to allow the somewhat invasive mineral inventory, citing the guarantee that the Kluvers would be paid for the use of their surface lands at the time mining commenced:

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[3]Exh. 2, *WECo I.*

> [W]e do not find the burden upon the servient estate [Kluvers'] unreasonable, particularly in view of the language in the mineral reservation which assures the surface owners the market value, at the commencement of the operations of the premises, used for such purposes or injured thereby.

WECo I, 195 Mont. at 211, 635 P.2d at 1302 (emphasis added). This Court did not identify any ambiguity in the mineral reservation when it considered it in 1981.

In the second case, *Western Energy Company v. Genie Land Company*, 227 Mont. 74, 737 P.2d 478 (1987) (*WECo II*), this Court addressed the constitutionality of a law commonly known as the Strip Mining Land Owner Consent Act.[4] This statute required that the surface owner of a split estate must consent to strip-mining, before a mining permit could be issued by the State. Based on the Act, Kluvers denied consent for strip-mining of their ranch. The district court held that the Kluver's were within their rights under the Act. On May 22, 1987, this Court ruled the Act unconstitutional. *WECo II,* 227 Mont. at 83, 737 P.2d at 484.[5]

On remand, the 16th Judicial District Court entered Judgment stressing the requirement that WECo pay Kluvers for the use of their surface at the time mining

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[4]§ 82-4-224, MCA.

[5]Exh. 3, *WECo II.*

commenced:

> A permanent injunction is hereby granted in favor of plaintiff-appellant Western Energy Company ... to enter upon the lands made the subject of this action ... for the purpose conducting coal strip-mining operations ... **provided, however**, that Western Energy Company **pays** to Genie Land Company the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations or injured thereby, including any improvements thereon.[6]

B. The Current Case.

In the years following *WECo II*, the parties considered the mining plan, which set out the boundaries of the future mine, and they attempted to negotiate the value that WECo would pay for Kluvers' surface lands. Serious offers were made by both sides, but no agreement was ever reached regarding the value of Kluvers' surface. WECo and Great Northern Properties (GNP), which had leased the mineral rights to WECo, told the Kluver's that if the value of their surface lands could not be agreed upon, "GNP and Western Energy will have exhausted all of [their] options and will have no alternative but to pursue a remedy in the courts. . ."[7]

In spite of this acknowledgment that the parties needed to agree ahead of

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[6]Exh. 4, Judgment, ¶ 3, July 30, 1987 (emphasis added).

[7]Exh. 5, Letter of G. Vaninetti to Douglas Benge, Feb. 7, 2000, p. 3.

time, or seek the assistance of a court in establishing the value to be paid for Kluver's surface lands, on May 12, 2002, WECo notified Kluvers that it would begin strip-mining immediately.[8] WECo did not take the simple step of filing a declaratory judgment action to resolve the matter properly. Instead, WECo told Kluvers it would place in escrow the amount it thought a reasonable lease payment for Kluvers' surface. In essence, WECo unilaterally decided to pay whatever it wanted into an account that it controlled. It is undisputed that no funds from WECo's escrow account have ever actually been conveyed to Kluvers.

At the time when WECo came on Kluvers' ranch to begin mining, Genie Land Company's board was without a quorum because the Kluvers' aunt and mother, two of Genie's three directors, had both died. As soon as these two estates were resolved and Genie could properly address WECo's trespass, Kluvers filed this case. The complaint sounds in numerous theories, but trespass is the primary theory under which Kluvers challenge WECo's decision to come on their ranch and mine without paying.[9]

WECo responded to Kluvers' trespass claim by invoking a word that appears nowhere in the mineral reservation or in the prior court opinions

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[8]Exh. 6, letter from J. O'Laughlin to C. Kluver, May 21, 2002.

[9]Exh. 7, Second Amended Complaint.

interpreting the reservation. That word is "owe." WECo explains as follows in its Answer:

> WECo had a right to mine pursuant to the Judgment entered in [*WECO II*] restraining Genie Land Company from interfering with Western Energy's right to mine and providing that Western Energy Company would **owe** to Genie Land Company the "market value at the time mining operations are commenced...[10]

As noted above, what the district court actually ordered following *WECo II* was that WECo could mine "... provided, however, that Western Energy Company pays to Genie Land Company the market value at the time mining operations are commenced..."[11] The mineral reservation and the district court's judgment both predicated WECo's right to take Kluver's surface lands on the condition that WECo pay market value of those lands at the time mining commenced. No court had ever determined that WECo could owe the Kluvers the market value of their land.

The Kluvers took a Rule 30(b)(6) deposition of WECo on this topic. WECo testified as follows:

> Q. Again, I'm asking you for WECO's understanding, because you're the person designated to speak for the company on its interpretation on what this language requires.

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[10]Exh. 8, WECo's Answer to Pls.' Second Amended Complaint, ¶12, (emphasis added).

[11]Exh. 3, Judgment, ¶ 3, July 30, 1987 (emphasis added).

A. Again, I think it's ambiguous, and I don't believe that WECO knew exactly when the payment had to be made. We knew we had to make a payment, but the timing was questionable.

Q. And you'll agree with me that WECO went onto the Kluver ranch and started strip mining without knowing, apparently, when it was supposed to make this payment?

A. Yes.

* * * * *

Q. In fact, it says, shall pay to the grantee, or its successors or assigns, the market value at the time mining operations are commenced; is that correct?

A. I interpret that to mean that we would owe them the market value at the time of mining, not that we had to pay it at the time of mining.[12]

C. <u>The District Court's Reinterpretation of the Mineral Reservation</u>.

On June 26, 2009, Kluvers moved for summary judgment on liability for trespass. The Parties' briefing is attached for this Court's reference.[13] In light of WECo's admission that it came on the Kluver ranch without ever actually paying

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[12]Exh. 9, Deposition of WECo, October 29, 2009, 39:8-40:12 and 44:24-45:6).

[13]Exh. 10, Plaintiffs' Motion and Brief for Partial Summary Judgment on Trespass.
Exh. 11, WECo's Response (without exhibits).
Exh. 12, Plaintiffs' Reply.
Exh. 13, WECo's Supplemental Response (without exhibits).
Exh. 14, Plaintiffs' Response to WECo's Supplemental Brief.

Kluvers anything for the right to do so, the Kluvers expected that their trespass motion would be granted as a perfunctory matter.

Instead, the district court considered WECo's argument that the phrase "shall pay market value at the time mining commences" could be just a reference to the time of valuation and might not require any actual payment. On this basis, the district court declared the mineral reservation ambiguous.[14]

Then, the district court went further and resolved the ambiguity as a question of law. Citing 70-1-516, MCA, for the proposition that ambiguities in deed reservations should be construed in favor of the grantor, the court held that WECo's interpretation should govern. The court then, *sua sponte,* granted summary judgment against the Kluvers and in favor of WECo on Kluvers' trespass claim.[15] This notwithstanding the fact that WECo had never even cross moved for summary judgment.

Plaintiffs immediately filed a motion explaining that if a court finds an ambiguity in a deed reservation, the ambiguity must be resolved by a jury considering extrinsic evidence of the document's meaning.[16] In response, the

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[14]Exh. 15, Order Denying Plaintiffs' Motion for Partial Summary Judgment, Oct. 13, 2009, 4:23-5:4.

[15]*Id.* at 5:-6:11.

[16]Exh. 16, Plaintiffs' Motion for Clarification.

court ordered the parties to submit affidavits attesting to any extrinsic evidence regarding the meaning of the mineral reservation[17]

The Kluvers submitted extensive opinions by Professor Jan Laitos, an expert in deed reservations and mineral contract analysis.[18] Among other sources, Professor Laitos analyzed an Executive Resolution of Northern Pacific Railway Company, which stated that the purpose of the exact language in the mineral reservation at issue here was to protect the railroad's vendees [here the ranchers].[19] Plaintiffs' cited the court to extensive Montana case law reflecting that such expert opinion evidence precludes summary judgment.[20]

Nevertheless, on March 31, 2010, the district court issued a one half page order ruling, without explanation, that the parties' extrinsic evidence would not assist the trier of fact and reaffirming its summary dismissal of the Kluvers' trespass claim.[21]

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[17]Exh 17, Order Clarifying and Expanding Order Denying Plaintiffs' Motion for Partial Summary Judgment.

[18]Exh. 18, Affidavit of Professor Laitos.

[19]*Id.* at 2-3.

[20]Exh. 19, Plaintiffs' Consolidated Reply Brief Re: Extrinsic Evidence and Response to Defendants' Motion for Summary Judgment, p. 2-11 (without exhibits).

[21]Exh. 20, Order Granting Partial Summary Judgment to Defendant on Trespass Claim.

IV. ARGUMENT

A. The District Court Erred in Determining That WECo Was Entitled to Strip-mine Without Paying Kluvers for Their Surface Lands.

1. Legal Standards Regarding Deed Interpretation.

In Montana, deeds are interpreted using the same rules as are used to construe contracts. *Van Hook v. Jennings*, 1999 MT 198, ¶10, 295 Mont. 409, 983 P.2d 995; § 70-1-513, MCA. In construing a contract, a court is simply to ascertain what it contains, not to insert language omitted by the parties. *Herrin v. Herrin*, 182 Mont. 142, 146, 595 P.2d 1152, 1155 (1979). A contract should not be construed to create an absurdity. *Mattson v. Montana Power Co.*, 2009 MT 286, ¶27, 352 Mont. 212, 215 P.3d 675.

Whether an ambiguity exists in a contract is a question of law. *Corporate Air v. Edwards Jet Center*, 2008 MT 283, ¶31, 345 Mont. 336, 190 P.3d 1111. "The existence of an ambiguity must be determined on an objective basis, and an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings." *Performance Machinery. Co., Inc. v. Yellowstone Mount. Club*, 2007 MT 250, ¶ 39, 339 Mont. 259, 169 P.3d 394. Mere disagreement between parties or their attorneys as to the interpretation of a written instrument does not create an ambiguity. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531; *Mary J. Baker Revoc. Trust v. Cenex Harvest*, 2007 MT 159, ¶

70, 338 Mont. 41, 164 P.3d 851.

Under Montana law, ambiguities in deeds must be resolved by the fact finder:

> Where the question of intent depends upon the construction of an unambiguous contract, the question is one for the court alone; however, where a contract term is ambiguous or obscure or uncertain of meaning, the interpretation of the language, and thus, the determination of the parties' real intent, is a matter to be left to the consideration of the jury.

Klawitter v. Dettmann, 268 Mont. 275, 281, 886 P.2d 416, 420 (1994) (citations omitted, emphasis added). Summary judgment is not usually proper where a provision in a deed restriction is ambiguous:

> In this case, the determinative fact is the interpretation of the deed reservation. Yet the reservation is ambiguous and the true intent of the parties is discernable only with reference to extrinsic evidence. "Summary judgment is usually inappropriate where the intent of the contracting parties is an important consideration."

Proctor v. Werk, 220 Mont. 246, 250, 714 P .2d 171, 179 (1986) (*quoting Twite v. First Bank (N.A.) Western Mont.*, 41 Mont. 2518, 2520, 692 P.2d 471, 472 (1984).

2. The District Court's Interpretation of the Mineral Reservation Contravenes the Rules of Construction and this Court's Prior Interpretation.

The district court's interpretation of the mineral reservation is erroneous for three reasons. First, the district court's entire analysis is premised on its threshold determination that the mineral reservation is ambiguous. This Court has long been

aware of the foundational principle that ambiguities in deeds must be resolved by a jury, not as an issue of law. *See, e.g., Proctor*, 220 Mont. at 250, 714 P .2d at 179. Had this Court identified an ambiguity in the payment provision when it considered that term in *WECo I*, it would have remanded for consideration by a jury. It would not have construed the meaning of that language as a matter of law and then used its construction to weigh the equities of allowing WECo to come on the Kluver's ranch. This Court was correct when it construed the language of the mineral reservation without finding an ambiguity.

Second, the district court's interpretation of the mineral reservation contravenes this Court's actual interpretation in *WECo I* and the interpretation of the Judge Thomas in 1987. Neither this Court, nor Judge Thomas, held that WECo could "owe" Kluvers the market value at the time mining commenced. Rather, the mineral reservation, Judge Thomas, and this Court all clearly stated that WECo must "pay" market value at the time mining commences.

Third, the district court's adoption of WECo's interpretation that it could "owe" Kluver's the value of their surface with no concrete obligation to actually pay creates an absurdity. Time of payment is a material term in a contract. A contract that allows a party to "owe" payment in perpetuity effectively requires no payment at all. As here, a company like WECo could decide to wait forever to

pay.

Moreover, as pointed out by Plaintiffs' mineral reservation expert, no party would enter into a contract that allowed a mining company to pay the 2002 value of land anytime in perpetuity, without a provision for the accrual of interest on the 2002 value owed.[22] WECo's interpretation, as adopted by the district court, would allow WECo to pay the Kluvers' heirs in 2002 dollars generations after 2002, or never. This is absurd. Contracts should not be construed to create an absurdity. *Mattson*, ¶27.

3. The District Court Erred in Resolving the Meaning of the Mineral Reservation as a Question of Law.

Even if the district court were correct that the mineral reservation is ambiguous, such ambiguity would need to be resolved by the jury. Kluvers submitted extensive expert opinion and extrinsic evidence regarding the meaning of the mineral reservation payment provision.[23] At a minimum, the intent of the original parties and the meaning of their payment provision in the mineral reservation is a fact question that should be resolved by jury. *See Klawitter* and *Proctor Supra.*

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[22]Exh 18, Affidavit of Professor Laitos, p. 3.

[23]*Id.*

B. Supervisory Control Is Appropriate.

1. Legal Standards Regarding Supervisory Control.

Supervisory control is appropriate where: (1) urgency renders normal appeal inadequate; (2) the issue is purely a legal question; and (3) a mistake of law is causing gross injustice. Rule 14(3), M.R.App.P.

Supervisory control is proper where a district court reinterprets a mineral conveyance that this Court previously considered without finding any ambiguity. *Continental Oil Co. v. Elks Nat. Foundation*, 235 Mont. 438, 441, 767 P.2d 1324, 1326 (1989) ("this Court recognized that the ratification conveyed an 'undivided one-half interest' in the [oil and gas] lease. Then, as now, we found no ambiguity in the ratification agreement. .... The District Court ignored this Court's opinion and reconsidered the effect of the ratification agreement. We therefore grant supervisory control.").

Appropriate reasons to exercise supervisory control include judicial economy and avoiding inevitable procedural entanglements. *Truman v. Montana Eleventh Judicial District Court,* 2003 MT 91, ¶15, 315 Mont. 165, 68 P.3d 654. Exercise of supervisory control is also appropriate to avoid extended and needless litigation. *Sportsmen For I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶ 5, 308 Mont. 189, 40 P.3d 400. The presence of constitutional issues of statewide

importance militates in favor of exercising supervisory control. *State Ex Re. Racicot v. District Court*, 244 Mont. 521, 524, 798 P.2d 1004, 1006 (1990).

2. Supervisory Control Is Proper in this Case.

Exactly as in *Continental Oil*, the district court here has reinterpreted a mineral conveyance that this Court previously considered without finding any ambiguity. As in *Continental Oil, Truman,* and *Sportsmen For I-143*, the district court is proceeding under a mistake of law, the issues of deed interpretation are purely legal, and an appeal would provide inadequate remedy.

Appeal would provide inadequate remedy, in part, because this case involves a continuing trespass. Unlike most tort litigation which is retrospective in that it involves a wrong and injuries that occurred in the past, WECo is still occupying Kluvers' ranch today and still has paid nothing for the right to do so.

Further, the district court's rulings will result in serious procedural entanglements such as those noted in *Truman*. For instance, in addition to trespass, Plaintiffs' complaint alleges that WECo was unjustly enriched by mining Kluvers' ranch without paying Kluvers for the use of their surface lands. Two days after it granted summary judgment against Kluvers on trespass, the district court granted a separate motion to compel production of WECo's financial information on the grounds that such information is relevant to Kluvers' unjust

enrichment claim.[24] How can Kluvers pursue their unjust enrichment claim, if the district court has, as a matter of law, adopted WECo's interpretation that WECo was legally entitled to occupy Kluvers' surface lands without paying Kluvers?

As a second example, some of Plaintiffs' trespass claims pertain to land owned in fee that is not subject to the mineral reservation at all. For instance, WECo's activity at the mine site caused erosion that silted in a drainage on adjacent portions of the Kluver Ranch. How can Kluvers pursue these trespass claims when the district court has relied upon its reinterpretation of the mineral reservation to grant summary judgment for WECo on Kluvers' entire trespass count?

Finally, this case implicates constitutional questions of State-wide importance. Few issues carry greater constitutional weight than those that bear upon private property rights. Split surface and mineral estates are ubiquitous in Montana. This is due in large part to the same type of federal railroad land grants and surface land conveyances that produced the mineral reservation at issue here. If allowed to stand, the district court's interpretation that a mineral owner can come on private property, without paying for the surface land used in mineral extraction, would create chaos in every Montana strip mine, oil patch, and coal

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[24] Exh. 21, Order Granting Plaintiffs' Motion to Compel, p. 2

bed methane field that touches a split estate. Such constitutional issues bode in favor of exercising supervisory control. *State Ex Re. Racicot*, 244 Mont. at 524, 798 P.2d at 1006.

V. CONCLUSION

The Kluvers respectfully request this Court to take supervisory control and direct that, under the Court's prior interpretation of the mineral reservation, WECo's entry on Kluvers' land, without paying for the right to use that land, constitutes a trespass. In the alternative, a jury should be allowed to consider extrinsic evidence and determine the meaning of the payment provision in the mineral reservation.

DATED this 30th day of April 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) and of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect for Windows, is not more than 4,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 30th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2010, a true and accurate copy of the foregoing was served upon counsel listed below by **US Mail**:

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